

Complainant (Portland)

v.

Respondent (Portland)

I. COMPLAINANT'S CHARGE:

Complainant, alleged sexual harassment, intimidation, hostile work environment and constructive discharge.

II. RESPONDENT'S ANSWER:

Respondent stated that Former Owner of Respondent;s completely and categorically denies every allegation in Ms. Complainant's complaint. He states that these things simply did not happen.

III. JURISDICTIONAL DATA:

- 1) Date(s) of alleged discrimination: November 2, 2007 through April 4, 2008.
- 2) Date complaint filed with the Maine Human Rights Commission: August 8, 2008.
- 3) Respondent employs between 15 – 20 employees and is subject to the Maine Human Rights Act, Title VII of the Civil Rights Act of 1964, as amended, as well as state and federal employment regulations.
- 4) Respondent is represented by William Vickerson, Esq. Complainant is represented by Robert Levine, Esq.
- 5) Investigative methods used: A thorough review of the written materials provided by the parties, interviews and an Issues and Resolution conference.

IV. DEVELOPMENT OF FACTS:

- 1) The parties and issues in this case are as follows:
 - a) The Complainant, is a female who worked for Respondent as a laborer / linen folder in the production area from November 2, 2007 until April 4, 2008.
 - b) The Respondent, operates an industrial business washing linens for restaurants and healthcare facilities at a location in Portland, Maine.

- c) Important parties: Former Owner, WB; Operations Manager, DC; Labor Ready Manager, DL; Current Owners, CB and CB; Office Manager, SV; Employee 1; Employee 2 ; Employee 3; Employee 4; Employee 5; Employee 6; Employee 7; Employee 8.
 - d) Complainant, alleged sexual harassment, intimidation, hostile work environment and constructive discharge. Respondent stated that Former Owner of the company completely and categorically denies every allegation in Ms. Complainant's complaint. He states that these things simply did not happen.
- 2) Ms. Complainant provided the following concerning her employment with Respondent:
- a) "I was employed by Respondent as a laborer, folding linen, between November 2, 2007 and April 4, 2008. My boss was Former Owner of the company before he transferred ownership to his son and daughter due to the divorce he was going through."
 - b) "Former Owner made working there unbearable, due to repeated conduct and behavior that demeaned me and others as women. For example, he constantly commented about my weight, told me that I had a fat ass and that I couldn't do things that a man could do. He'd call me a bitch and occasionally, a whore. He called me fat ass, blubber butt. He slapped my butt when I was clocking out; and pushed me when I was bent over a linen cart. He harassed other women as well, to the point where Labor Ready would not send any more temporary employees. He called the guys "fags" or fruitloops because of their dress or earrings."
 - c) "He screamed at us. It was embarrassing. I finally left because it was such a hostile work environment."
- 3) Respondent provides the following concerning Ms. Complainant's employ with the company:
- a) "Ms. Complainant began working for Respondent in November of 2007 where she worked in the production area on an ironer. Although her attendance was spotty, we were generally happy with her work. At some point in time during the spring of 2008, Ms. Complainant simply stopped coming to work."
 - b) "Ms. Complainant did not call, nor did she offer an explanation. She simply stopped showing up for work. She had a company-issued cell phone which needed to be returned and although Operations Manager made several calls to try to retrieve the phone, Ms. Complainant did not respond. Finally, Operations Manager went to her apartment with another employee and they exchanged her final paycheck for the cell phone."
 - c) "At that time, Ms. Complainant said nothing to him about the allegations which she now presents to the Commission. In fact, Operations Manager does not recall that she said anything at all to him that day. She gave him the phone and accepted the paycheck, then closed the door."
- 4) Ms. Complainant responds as follows:

- a) "Before Operations Manager came to my apartment, they wouldn't give me my check. That's why I kept the company cell phone. I had called a former co-worker and explained that I would be willing to exchange my final paycheck for the cell phone."
 - b) "I didn't say anything to Operations Manager when he and a former co-worker came to my door, but while I worked there, this particular woman and I discussed why I felt the need to leave there. She was actually considering making a move as well. She actually quit a couple months after I left. I told her about the sexual harassment and she was there when a lot of the incidents occurred."
 - c) "Before I started work at Respondent, the other women told me what Former Owner was like, but I really needed a job. I have three kids. The first month went well, but he made fun of me to others and it really hurt my feelings. He made hurtful remarks about my weight and they, in turn, would report these comments to me. I have since lost 100 pounds."
 - d) "I was intimidated by Former Owner and I didn't want to get fired, so I felt that I had to put up with it. He was intoxicated every day. He brought us into the bar across the street sometimes. He drank there as soon as they opened in the mornings."
- 5) Ms. Complainant describes the details surrounding the events which caused her to leave her job:
- a) "The Friday that I left, it was really hectic. Supervisor was in California on vacation for one to two weeks and I had to take her place. We had a lot of orders to fill. Supervisor had been working for Respondent and its predecessors for approximately five years. Things got very frenetic and I didn't know what to do, so I went to Operations Manager and he raised his voice. He was obviously very frustrated. I was, too. It was my first time filling and shipping out orders and I just needed help."
 - b) "When Operations Manager got frustrated and he raised his voice, I felt that he didn't want to help me. It was 9:00 pm. Then, Former Owner came in and started "cracking on us some more. Every time he came into the warehouse, he would pick on us, telling us to stand up straight, yell at us, send us home or make sarcastic remarks."
 - c) "I was in the back, folding. We had to do the very large tablecloths. Former Owner came in and yelled at me because I was in the back of the iron and I was supposed to be filling orders, but there weren't enough workers. He came to where I was and yelled at me. I remember telling him that I was not Supervisor and couldn't do the things Supervisor did. He said that 'it's not that f- - - - - hard. How hard is it to fill these orders and ship them?'"
 - d) "He walked off swearing and I went up to Operations Manager and asked why that guy hated me so much. Operations Manager said that he just wants the work done. I told them that there weren't enough workers."
 - e) "We left a little after 9:00 pm. I remember telling Operations Manager, 'you'll be lucky if I come back. He said, 'yeh, they all say that.'"
 - f) "Earlier that day, I had offered Former Owner some chapstick for his dried lips. He said to me, 'what are you worried about, I'm not eating your p - - - -.' I said, 'why are you so

worried about my weight, I'm not f - - - - - you.' I would not normally speak this way to him, but I was getting so frustrated and angry with his attitude toward me. He did not respond immediately. He waited until lunchtime, and said in front of everyone, 'Complainant, I'm not worried about your weight. It's the fact that you're 20 years old and you're too f - - - - - fat.' I was so humiliated. I'll never forget it."

6) The following statements were made during individual interviews with witnesses:

- a) Employee 1: "Former Owner will come right out and say, 'you need to lose weight.' He doesn't respect women and he fears assertive women. I know that he makes sexual comments at work. He pays good money and that's why we work there. We have kids. With the economy the way it is, it's really hard to support our kids. I heard him say about a woman, 'I would have to take a whole bottle of Viagra to get it up with her.'"
- b) Employee 5: "I quit my job because Former Owner and I had a disagreement. I had given him a month's notice about needing a day off because of my Dad's open heart surgery. On that day, no one showed up to work. Former Owner called me and was pressuring me. I had to be at the hospital with my Dad. Former Owner was aggressive, yelling, 'you're not a surgeon; there's nothing you can do for him at the hospital.' We had a big fight about it. I was supposed to be my father's caregiver for the day. I quit my job."
 - i. This witness expressed fear about being interviewed. She explained that she has four children and is in the process of trying to get unemployment and said that she couldn't take any chances to 'mess that up.'
 - ii. She stated that Former Owner said 'nigger' often at Respondent. In threatening his workers, she alleged that he would say that he could get a whole bunch of "chinks" for \$5 an hour. She stated that Former Owner was at Respondent all day long, and that a lot of the time, he had been drinking. She stated that Ms. Complainant had confided in her that Mr. Bradbury made offensive comments to her, that he'd told Ms. Complainant that if she lost 100 pounds, that she could be an exotic dancer again.
 - iii. Employee 5 also explained that the workplace was very hostile, stressful and that Former Owner took on more accounts than could be handled by the number of employees he had. She stated that Ms. Complainant was intimidated because Former Owner would tell her that 'if you don't work faster, you'll lose your job.' She also said that Former Owner was often at the bar across the street, drinking during the workday."
- c) Employee 6: "Former Owner was rude and vulgar to everyone. He was inconsiderate about Complainant's weight. I saw him slap Complainant's buttocks, as well as everyone else's. It was usually after he'd been drinking, which he did every day. He'd come into Respondent drunk. He grabbed a co-worker's boobs once, I actually saw it occur. He made boob comments often. I saw him reach into a co-worker's cleavage once, and saw him pull out either a chapstick or lip gloss.

"Former Owner used the word 'nigger' when he spoke with two co-workers and I. I heard him call Complainant a 'nigger lover.' I'm African American. I felt that it was a very hostile work environment. The day I left there, he was screaming in my face and I could actually feel the spit on my face. I was in tears. Former Owner called us lazy, good-for-nothing bitches. There were times when we had as many as eight children in there, between the ages of three and twelve. We brought our children in because the work needed to be done and we had no childcare. Insurance premiums were taken out of our paychecks, but our insurance was cancelled because he wasn't paying the premium on our insurance."

"By 1pm, Former Owner was usually drunk; we could smell the liquor on him."

"I did paperwork for him in the office on weekends. He paid me with cash. I have three kids to support. When employee paperwork such as DHHS forms, food stamp forms, requests for references, etc. were mailed in, he told me specifically that these things were to be thrown out."

- d) Employee 7: "Complainant was upset and hurt. She did tell us that Former Owner was rude and inconsiderate of her feelings and that he had told her that if she lost 100 pounds, he would pay her to take her clothes off and dance for him."

When asked if she had heard Complainant offer her chapstick to Former Owner, this witness said, "I think so, but I'm not clear. We tried to get along with him. She tried to make him like her, and I can see her trying to do that to be nice to him. This witness felt that Complainant had been sexually harassed by Former Owner at Respondent. She stated that there were other women who were sexually harassed by him as well. She alleged that he would say things like, 'your boobs look good today.'"

- e) Employee 8: "It was my first day at Respondent. I hadn't been there thirty minutes yet. Former Owner was talking with my co-worker. I looked at him because I thought that he was talking to me. He said, 'why don't you find something for your f - - - - - sister to do so that she can stop f - - - - - looking at me.'"

"A couple days later, he was more abusive, more aggressive because there was a washcloth left in the wrong place. He asked me, 'what are you, an idiot or something?' On the day that my Dad was having open-heart surgery, I was visibly upset. Former owner was really awful.. He said, 'people die every day.' He's very insensitive."

- 7) Manager of the temporary placement agency made the following comments regarding his agency's interaction with Former Owner:

- a) "I was told by temporary employees that they had been treated in a very belligerent and aggressive manner by Former Owner. They said that he used very unsavory language when he showed up. He told them to work faster, that it wasn't f - - - - - rocket science."
- b) "I spoke with Former Owner because it wasn't the first time that I had heard comments of this nature attributed to him. I explained that just because they were temporary employees, he couldn't treat them that way. I wanted to know why they were being verbally abused."

- c) "Two temporary employees refused to go back to Respondent during this relevant period of time."
- 8) Operations Manager offered the following:
- a) "I've worked for Former Owner on and off for twenty years."
 - b) "Complainant was a great worker when she came to work. Her attendance was spotty. There was often a problem with either rides or childcare."
 - c) "Complainant seemed to get along well with everybody. Everybody interacted with everyone else. It's a small company. There are between 15 – 20 employees."
 - d) "I never saw Former Owner interact with Ms. Complainant in a disrespectful manner. I never heard him make comments about her weight, never saw him slap her buttocks, never heard him respond to Ms. Complainant in a vulgar manner."
 - e) "Former Owner spends no time at the bar across the street during the workday. He is here from 6am through 2pm and what he does when he leaves work is his business."
 - f) "Ms. Complainant never told anyone why, she just simply stopped coming to work."
- 9) Additional evidence revealed the following:
- a) Respondent has no sexual harassment policies and conducts no sexual harassment training. Rather, Respondent states that it relies on the required state and federal posters, which are posted conspicuously in the workplace.
 - b) Upon arrival for the Issues and Resolution conference, Former owner presented this investigator with the United States Bankruptcy Court's form 18, Discharge of Debtor. He had allegedly told employees that it didn't matter that Ms. Complainant had filed a sexual harassment complaint, because he had gone bankrupt and she couldn't touch him.

V. ANALYSIS:

- 1) The Maine Human Rights Act provides that the Commission or its delegated investigator "shall conduct such preliminary investigation as it determines necessary to determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S.A. § 4612(1)(B). The Commission interprets the "reasonable grounds" standard to mean that there is at least an even chance of Complainant prevailing in a civil action. More particularly, "reasonable grounds" exists when there is enough admissible evidence, or there is reason to believe that formal litigation discovery will lead to enough admissible evidence, so that there is at least an even chance of Complainant proving in court that unlawful discrimination occurred. Complainant must prove unlawful discrimination in a civil action by a "fair preponderance of the evidence." 5 M.R.S.A. § 4631.
- 2) Maine Human Rights Act provides, in part, as follows: It is unlawful employment discrimination, in violation of this Act . . . for any employer to . . . because of . . . sex . . .

discriminate with respect to the terms, conditions or privileges of employment or any other matter directly or indirectly related to employment. . . ." 5 M.R.S.A. § 4572(1)(A).

- 3) The Maine Human Rights Commission Regulations provide, in part, as follows:
Harassment on the basis of sex is a violation of Section 4572 of the Maine Human Rights Act. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of sexual nature constitute sexual harassment when: . . . such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. Me. Hum. Rights Comm'n Reg. § 3.06(I) (1) (July 17, 1999).
- 4) "Hostile environment claims involve repeated or intense harassment sufficiently severe or pervasive to create an abusive working environment." *Doyle v. Dep't of Human Servs.*, 2003 ME 61, ¶ 23, 824 A.2d 48, 57. In determining whether an actionable hostile work environment claim exists, it is necessary to view "all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* (citations omitted). It is not necessary that the inappropriate conduct occur more than once so long as it is severe enough to cause the workplace to become hostile or abusive. *Id.*; *Nadeau v. Rainbow Rugs*, 675 A.2d 973, 976 (Me. 1996). "The standard requires an objectively hostile or abusive environment--one that a reasonable person would find hostile or abusive--as well as the victim's subjective perception that the environment is abusive." *Nadeau*, 675 A.2d at 976.
- 5) The fact that the conduct complained of is unwelcome must be communicated directly or indirectly to the perpetrator of the conduct. *See Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988). In some instances, Complainant may have the responsibility for telling the alleged harasser directly that his or her comments or conduct is unwelcome. In other instances, however, Complainant's consistent failure to respond to suggestive comments or gestures may be sufficient to communicate that the conduct is unwelcome. *Id.* Where Complainant never verbally rejects a supervisor's sexual advances, yet there is no contention or evidence that Complainant ever invited them, evidence that Complainant consistently demonstrated unalterable resistance to all sexual advances is enough to establish their unwelcomeness. *See Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 784 (1990). Complainant may also be relieved of the responsibility for directly communicating unwelcomeness when she reasonably perceives that doing so may prompt the termination of her employment, especially when the sexual overtures are made by the owner of the business. *Id.*
- 6) The MHRC Regulations provide the following standard for determining employer liability for sexual harassment committed by a supervisor:
An employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment. . . . When the supervisor's harassment does not culminate in a tangible employment action, the employer may raise an affirmative defense to liability or damages by proving by a preponderance of the evidence:
that the employer exercised reasonable care to prevent and correct

promptly any sexually harassing behavior, and
(b) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Me. Hum. Rights Comm'n Reg. § 3.06(I) (2) (July 17, 1999).

- 7) Here, the Complainant is a young woman whose employment experience involved pervasive sexual harassment by the Former Owner:

Former Owner made frequent sexual comments, including telling Ms. Complainant that if she lost 100 pounds, he would pay her to take her clothes off and dance for him.

Ms. Complainant complained that Former slapped her buttocks, an incident which she described in a credible manner and which was substantiated by other witnesses.

Ms. Complainant was also credible in her assertion that she offered her chapstick to Former Owner as a gesture of friendship, and that he responded with this acerbic and vulgar response, "why are you so interested in my chapped lips, I'm not eating your p - - - y." When asked if she had heard Complainant offer her chapstick to Former Owner, Employee 7 said, "I think so, but I'm not clear. We all tried to get along with him. She tried to make him like her, and I can see her trying to do that to be nice to him. Employee 7 felt that Ms. Complainant had been sexually harassed by Former Owner at Respondent. She stated that there were other women who were sexually harassed by him as well. She alleged that he would say things like, "your boobs look good today." For this reason, it's not much of a departure from a consistent witness characterization to believe that he would make this salacious remark. In turn, Ms. Complainant said that she was so hurt and fed up by that point in time that she responded in kind, by asking, "why are you so worried about how fat I am, I'm not f - - - - - you?" When Ms. Complainant states that she never returned after this day, it's not difficult to understand why, particularly when one considers what happened at lunchtime. Former Owner waited until all of her co-workers had gathered for lunch and said, "Complainant, it's just that you're twenty years old and you're too f - - - - - fat." Ms. Complainant stated at the Issues and Resolution conference that she was so humiliated, that she'll never forget it.

Employee 5 explained that the workplace was very hostile, stressful and that Former Owner took on more accounts than could be handled by the number of employees he had. She stated that Ms. Complainant was intimidated by him because Former Owner would tell her that "if you don't work faster, you'll lose your job." She also said that Former Owner was often at the bar across the street, drinking during the workday and that he was very abusive after he had been drinking.

Employee 6 substantiated that Former Owner was rude and vulgar to everyone. She said that he was inconsiderate about Complainant's weight. She saw Former Owner slap Complainant's buttocks, as well as everyone else's. She stated that it was usually after he'd been drinking, which he did every day. She said that he'd come into Respondent drunk. She stated that he grabbed a co-worker's "boobs" once; I actually saw it occur. He made "boob" comments often. She said, "I saw him reach into a co-worker's cleavage once, and saw him pull out either a chapstick or lip gloss."

“Former owner used the word ‘nigger’ when he spoke with two co-workers and I. I heard him call Complainant a ‘nigger lover.’ I’m African American. I felt that it was a very hostile work environment. The day I left there, he was screaming in my face and I could actually feel the spit on my face. I was in tears. Former owner called us lazy, good-for-nothing bitches. There were times when we had as many as eight children in there, between the ages of three and twelve. We brought our children in because the work needed to be done and we had no childcare. Insurance premiums were taken out of our paychecks, but our insurance was cancelled because he wasn’t paying the premium on our insurance.”

“By 1pm, Former owner was usually drunk; we could smell the liquor on him.”

Complainant did nothing to invite Former Owner to engage in this behavior, she never reciprocated, and to the best of her ability, she avoided his offensive and unwelcome behavior.

Respondent is unable to raise and prove an affirmative defense to liability in this case, with reasoning as follows:

Complainant did everything she could to avoid being harassed by Former Owner.

Respondent has no sexual harassment policy, but relies on the required state and federal posters which are posted “conspicuously in the workplace.” Ms. Complainant, mother of three small children, felt powerless to avoid the tenor in this sexualized environment, feared losing her job and, as she said, “felt I just had to put up with it.” No employee should have to quit her job because of sexual harassment. Employers are responsible for protecting their employee from sexual harassment at work. In this case, the abuse was not only sexual, but also psychological. Former Owner’s threat that if she did not work faster, “she could lose her job” continued to cause anxiety and fear, as she was trying to place food on the table for her three small children.

Respondent is also liable for Complainant’s decision to quit, with reasoning as follows:

It is a violation of the Maine Human Rights Act if, although not formally terminated, an employee has no reasonable alternative to resignation because of intolerable working conditions. *See King v. Bangor Federal Credit Union*, 611 A.2d 80, 82 (Me. 1992). “The test is whether a reasonable person facing such unpleasant conditions would feel compelled to resign.” *Id*

Here, Complainant was subjected to unlawful sexual harassment by Former Owner and there is no doubt that a reasonable person would resign, as did Complainant.

VI. RECOMMENDATION:

For the reasons stated above, it is recommended that the Maine Human Rights Commission issue the following finding:

- 1) There are **Reasonable Grounds** to believe that the Respondent, Respondent, is liable for sexual harassment and constructive discharge of Complainant, and;
- 2) Conciliation should be attempted in accordance with 5 M.R.S.A. § 4612(3).

Patricia E. Ryan, Executive Director

Michèle Dion, Investigator